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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JULIO PEREZ,

Defendant and Appellant.

B300470

(Los Angeles County
Super. Ct. No.
TA087610)

APPEAL from an order of the Superior Court of Los Angeles County, Connie R. Quinones, Judge. Reversed and remanded with directions.

Spolin Law, Aaron Spolin, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Senior Assistant Attorney General, Charles S. Lee and Charles J. Sarosy, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Julio Perez (defendant) appeals from an order denying his petition for resentencing under Penal Code section 1170.95.¹ The Attorney General concedes the trial court should have appointed counsel for defendant before denying the petition and a remand for further section 1170.95 proceedings is required. That will be our disposition.

A trial jury convicted defendant of two counts of first degree murder and three counts of attempted robbery for his role in the fatal shooting of two gas station employees in November 2006. The jury found not true a multiple murder special circumstance allegation and was unable to reach a verdict on a robbery special circumstance allegation.

Defendant appealed, arguing (among other things) the trial court erred in instructing the jury on principles of felony murder and the natural and probable consequences doctrine. This court affirmed defendant's convictions in 2010 but directed the superior court to modify the abstract of judgment to specify a sentence of 50 years to life.

In January 2019, defendant filed a section 1170.95 petition seeking to vacate his murder convictions. The petition included a request for the appointment of counsel. The trial court denied the petition without appointing counsel for defendant. The court concluded, based on our 2010 opinion's recitation of the evidence presented during defendant's trial, that defendant did not qualify for resentencing because he was "a major participant in the

¹ Undesignated statutory references that follow are to the Penal Code.

underlying felony and acted with reckless indifference to human life.”²

The trial court’s denial of the petition without appointing counsel was error. While a court may summarily deny a petition before appointing counsel if a petitioner is ineligible for relief as a matter of law (*People v. Smith* (2020) 49 Cal.App.5th 85, 92 (*Smith*), review granted Jul. 22, 2020, S262835 (*Smith*); *People v. Verdugo* (2020) 44 Cal.App.5th 320, 330, review granted Mar. 18, 2020, S260493), defendant is not so ineligible. It is undisputed his jury was instructed on felony murder (and the natural and probable consequences doctrine) and the trial court’s only basis for denying section 1170.95 relief turned on its assessment of the trial evidence. As the Attorney General recognizes, that type of assessment is not permitted at the prima facie stage. (*Smith, supra*, at 92 [“If . . . a determination of eligibility requires an assessment of the evidence concerning the commission of the petitioner’s offense, the trial court must appoint counsel and permit the filing of the submissions contemplated by section 1170.95”]; see also § 1170.95, subds. (c), (d)(3).)

² The court emphasized defendant knew one of his accomplices had a gun, handed the gun to the accomplice before the attempted robbery, hid another accomplice’s face with a sweatshirt before the accomplice committed the attempted robbery, and waited outside the gas station with the car running to serve as the getaway driver.

DISPOSITION

The order denying defendant's section 1170.95 petition is reversed and the matter is remanded with directions to appoint counsel for defendant and to thereafter proceed as required by section 1170.95, subdivision (c).

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BAKER, J.

We concur:

RUBIN, P. J.

MOOR, J.